



Policy Memo	
KDHE-DHCF POLICY NO: 2021-02-01	From: Erin Kelley, Senior Manager
Date: February 23, 2021	Medical KEESM Reference(s): 8141, 8144.3, 8144.4, 8241, 8244.3, 8244.4
RE: Spouse's Resources Disregarded in Long Term Care Determination	Program(s): Long Term Care Medical

The purpose of this memo is to provide guidance to eligibility staff concerning when the resources of a community spouse may be disregarded in determining the eligibility of the long term care spouse. This memo also provides instruction on when an undue hardship may be granted due to resource ineligibility from application of the community spouse resource allowance (CSRA). This policy is effective with the issuance of this memo.

I. BACKGROUND

The agency often receives applications for long term care coverage where the applicant reports being married but provides no information concerning the other spouse. Upon investigation, eligibility staff discover that the couple are living apart and it will be difficult or impossible to obtain income and/or resource information from the estranged spouse. A request is then made by eligibility staff to budget the applicant as a single individual, thereby negating the need to obtain the missing spouse's information. While it is never appropriate to budget a married applicant as a single individual, there may be instances where the absent spouse's resources and income is not considered in determining the applicant spouse's eligibility.

II. MARRIED APPLICANT/RECIPIENT

A. BASIC RULE

The basic rule is that married couples are legally responsible for each other and remain so until the marriage is legally either dissolved or annulled. This includes estranged couples who are still married but living apart. See Medical KEESM 4312.

As long as the couple remains married, calculation of the community spouse resource allowance (CSRA) and determination of eligibility of the long term care spouse shall include the resources and income of both spouses, with three (3) exceptions.

B. EXCEPTIONS

There are three (3) exceptions to the basic married couple rule stated above, where the community spouse is uncooperative in supplying information, the whereabouts of the community spouse is unknown, or the community spouse has been abusive towards the long term care spouse.

1. UNCOOPERATIVE SPOUSE

An uncooperative spouse is one who fails, refuses, or is physically or mentally unable to cooperate in providing his/her resource information to complete the CSRA determination or making the attributed resources in excess of the CSRA available to the long term care spouse. This would include spouses who are living together or apart. A long term care spouse who is otherwise eligible for assistance shall not be denied due to the community spouse's failure (either willing or unwilling) to cooperate *if all of the following conditions are met.*

a) INELIGIBLE

The long term care spouse is ineligible for coverage due to:

- i) The community spouse's failure, refusal, or inability to cooperate in providing needed information, and the CSRA cannot be determined, or
- ii) Attribution of resources in excess of the CSRA, and the community spouse refuses to make those attributed resources available to the long term care spouse;

b) OWN RESOURCES

The long term care spouse would be eligible if only his/her own resources were counted;

c) NO OTHER MEANS

The long term care spouse has exhausted his/her own resources and has no other legal means to pay for the long term care; and

d) ASSIGNMENT OF RIGHT TO SUPPORT

The long term care spouse assigns his/her rights to support from the community spouse to the state, or the state has the right to bring a support proceeding against the community spouse without an assignment where the long term care spouse is unable to make the assignment.

Note: By signing and filing the application for assistance, the applicant has met this requirement. No additional authorization is required. Assignment to the state occurs automatically once eligibility has been approved [K.S.A. 39-709(g)(1)(A)].

If all of the above conditions in subsections (a) through (d) above are met, eligibility shall be based on the long term care spouse's own resources. Any assets owned by the community spouse shall be disregarded in determining eligibility for the long term care spouse. Note that the M-3 (Notice of Intent to Allocate Income) form will only be required where income is to be allocated to a dependent family member as no income may be allocated to the uncooperative community spouse in these situations.

2. WHEREABOUTS OF SPOUSE UNKNOWN

When a long term care spouse reports that the whereabouts of his/her community spouse is unknown, the long term care spouse may have the eligibility determined based on his/her resources only *if all of the following conditions are met.*

a) LIVING SEPARATELY

The spouses were continuously living separate and apart without cohabitation immediately prior to the request for long term care coverage;

b) UNABLE TO LOCATE

Neither the long term care spouse (or responsible person) nor the agency have been able to locate the community spouse after taking all reasonable steps under the circumstances to do so. An affidavit so attesting from the long term care spouse (or responsible person) is required to document the unsuccessful search;

c) ASSIGNMENT OF RIGHT TO SUPPORT

The long term care spouse assigns his/her rights to support from the community spouse to the state, or the state has the right to bring a support

proceeding against the community spouse without an assignment where the long term care spouse is unable to make the assignment;

Note: By signing and filing the application for assistance, the applicant has met this requirement. No additional authorization is required. Assignment to the state occurs automatically once eligibility has been approved [K.S.A. 39-709(g)(1)(A)].

d) COOPERATION

The long term care spouse cooperates in any effort to locate the community spouse, to obtain information about the community spouse's resources, or to obtain financial support from the community spouse; and

e) CIRCUMVENTION

The agency has subjectively determined based on available evidence that the separation was not intended to circumvent the spousal impoverishment provisions concerning attribution of marital resources. When making this determination, the agency shall consider the following:

- i) The nature and length of the physical separation.
- ii) The long term care spouse's medical condition at the time of the separation.
- iii) Whether the community spouse potentially owns separate resources.
- iv) Whether the ownership of commingled resources changed recently.
- v) Any other facts that support or refute the affidavit, mentioned in (b) above, signed by the long term care spouse (or responsible person).

If all of the conditions in subsections (a) through (e) above are met, eligibility shall be based on the long term care spouse's own resources. In addition, since a CSRA will not be completed, the M-2 (Notice of Intent to Transfer Resources) form is not required. Note that the M-3 (Notice of Intent to Allocate Income) form will only be required where income is to be allocated to a dependent family member as no income may be allocated to the missing community spouse in these situations.

3. ABUSIVE SPOUSE

When a long term care spouse reports that his/her community spouse has been physically and/or emotionally abusive and fears for his/her safety by contacting the community spouse, the long term care spouse may have eligibility determined based on his/her resources only *if all of the following conditions are met.*

a) DOCUMENTATION OF ABUSE

The long term care spouse must provide documentation of the physical and/or emotional abuse. That documentation could include (but is not limited to) any, or all, of the following:

i) Police report

A police report (or reports) that documents the nature of the relationship of the parties and details the reported incident (or incidents) of abuse by the community spouse.

ii) Restraining order

A copy of a restraining order filed by the long term care spouse against the community spouse, including the allegations of abuse against the community spouse.

iii) APS report

Substantiation of abuse by the community spouse as determined by an investigation completed by Adult Protective Services (APS) within the Kansas Department for Children and Families (DCF).

Note: If the long term care spouse is claiming abuse from the community spouse, and there has been no previous involvement of APS, a referral to that agency may be appropriate to fully protect the safety of the long term care spouse.

iv) Any other court documents

Any other court documents or papers that verify the long term care spouse's account of abuse by the community spouse that appears to put the safety of the long term care spouse in jeopardy.

v) *Written statements from others*

Written corroboration from others with first-hand knowledge of abuse.

b) COOPERATION

The long term care spouse cooperates in any effort to obtain information about the community spouse's resources, to obtain financial support from the community spouse, or to cooperate with APS if referred.

c) ASSIGNMENT OF RIGHT TO SUPPORT

The long term care spouse assigns his/her rights to support from the community spouse to the state, or the state has the right to bring a support proceeding against the community spouse without an assignment where the long term care spouse is unable to make the assignment.

Note: By signing and filing the application for assistance, the applicant has met this requirement. No additional authorization is required. Assignment to the state occurs automatically once eligibility has been approved [K.S.A. 39-709(g)(1)(A)].

C. DIVORCE REPORTED

Should an applicant who is adversely affected by these provisions later report to the agency that the marriage has been dissolved, or that he/she has never actually been married, the information shall be considered suspect and subject to verification. See Medical KEESM 1322.3 concerning verification of questionable information.

1. DIVORCE DECREE

A copy of the divorce decree (or annulment) shall be required. If verification of the reported divorce has not been provided, the couple shall continue to be considered married for eligibility purposes. If verification of divorce is provided, eligibility may be redetermined if the couple was not actually married at the time of the original application and the individual should have been budgeted as a single individual.

2. PROPERTY SETTLEMENT

Verification of the property settlement shall also be provided. Failure of the applicant ex-spouse to receive an equitable share of the marital assets at the time of divorce may result in consideration of a transfer of property penalty. If the property settlement was

equitable, the assets attributed to the applicant ex-spouse shall be used to determine resource eligibility based on the exempt/non-exempt status of those assets.

To determine if the property settlement was equitable, see the guidance provided in Medical KEESM 5722 (10).

III. UNDUE HARDSHIP

When attribution of resources to the long term care spouse based on a *validly completed* CSRA results in ineligibility, that ineligibility shall be waived if an undue hardship exists. An undue hardship only applies to situations where the CSRA has been determined and resources in excess of the CSRA results in ineligibility of the long term care spouse. An undue hardship does not apply to situations noted in section II above where the CSRA could not be completed due to the absence, uncooperativeness, or abusiveness of the community spouse. The two policies are separate and distinct.

A. DEFINITION

An undue hardship exists where an application of the agency determined CSRA puts either spouse at serious risk of deprivation of necessary medical care, food, shelter, or other necessities of life due to the attribution of resources in excess of the CSRA to the long term care spouse.

For illustrative purposes only, examples of undue hardship may include, but are not exclusive to, the following situations.

1. OUTSTANDING DEBT

The couple has a substantial outstanding debt which must be met through the resources attributed to the long term care spouse. The attributed resource cannot be made available to the long term care spouse because to do so would inhibit the community spouse's ability to repay the debt thus resulting in medical harm to the community spouse.

2. LOSS OF INCOME

Liquidation of resources would cause a substantial loss of income which impairs the community spouse's ability to meet his/her own basic needs. Making the attributed resources available to the long term care spouse would decrease the amount of income-producing assets available to the community spouse and thus substantially diminishing the ability to meet his/her own needs.

In most instances, the community spouse will be the one personally claiming the hardship. However, the hardship claim could be for the long term care spouse where his/her needs are not being met in the institutional setting. This should be a rare occurrence.

B. CLIENT RESPONSIBILITY

When a claim of undue hardship is made, the applicant/recipient has the following responsibilities:

1. REQUEST

The applicant must submit a claim, either orally or in writing, of undue hardship. The agency will not initiate a claim unless requested by the applicant/recipient. The claim must be received by the agency within twelve (12) calendar days from the date the notice of the CSRA and eligibility determination is issued by the agency. The request must clearly state that an undue hardship is being requested based on the CSRA.

2. DOCUMENTATION

The undue hardship claim must be supported by documentation provided by the applicant/recipient at the time of the claim. An unsupported self-attested claim of undue hardship will be denied as unsubstantiated. Documentation should include all available evidence to support the claim, such as an explanation of the undue hardship being claimed, the nature of the amount of outstanding debt repaid with the attributed resources or how loss of attributed resources would impact the ability of the community spouse to meet his/her own needs.

C. AGENCY DETERMINATION

Once the claim of undue hardship has been received, the agency has the following responsibilities:

1. SUBMIT THE CLAIM

Eligibility Staff shall submit the claim and all supporting documentation provided by the applicant/recipient to KDHE-DHCF Eligibility Policy within ten (10) calendar days of receipt. The claim and all documentation shall be sent electronically to:

kdhe.medicaideligibilitypolicy@ks.gov.

2. EVALUATE THE CLAIM

KDHE-DHCF Eligibility Policy shall review the claim and supporting documentation and make a decision on the claim within twenty (20) calendar days from the date the request

for review is received. KDHE-DHCF Eligibility Policy will report the decision back to eligibility staff, who shall promptly formally notify the applicant/recipient of the decision.

a) APPROVED

If the undue hardship claim is approved, eligibility shall be redetermined by disregarding the resources otherwise attributed to the long term care spouse under the previously determined CSRA. All other eligibility factors must still be met.

Notification of the undue hardship request approval shall be sent by eligibility staff to the individual using the following notice fragment:

“Your request for undue hardship has been approved. You have proven that your resources are not available to meet your long term care medical needs. We will not count any of the resources you or your spouse own when we redetermine your eligibility for assistance. We will contact you if more information is needed. We will notify you once a decision about your eligibility has been made.”

b) DENIED

If the undue hardship claim is denied, the original eligibility determination based on attributed resources under the CSRA stands. As noted above, eligibility staff must formally notify the applicant/recipient of the decision. At that point, the applicant/recipient has the right to file a fair hearing request with the Office of Administrative Hearings (OAH) to dispute the undue hardship decision.

Notification of the undue hardship request denial shall be sent by eligibility staff to the individual using the following notice fragment:

“Your request for undue hardship has been denied. You failed to prove that none of your resources can be used to meet your long term care medical needs. Your eligibility for assistance will not be redetermined. The decision to deny your application due to excess resources remains in place. If you disagree with our decision to deny your undue hardship request, you may file an appeal through the fair hearing process.

This decision is in accordance with Medical KEESM 8144.4 and 8244.4.”

Note: Failure of the agency to meet the ten (10) and twenty (20) day timelines mentioned above shall not result in a default decision granting an undue hardship exception. An undue hardship decision shall still be rendered by the agency based on the stated claim and supporting documentation provided. Whenever the above timelines are not met, the agency shall still endeavor to make a formal decision as expeditiously as possible based on the circumstances. Also note that the references to Medical KEESM 8144.4 and 8244.4 are new provisions that will be implemented with this policy change.

D. REDETERMINATION OF ELIGIBILITY

Should the undue hardship request be granted, eligibility for long term care coverage shall be redetermined without counting any of the couple's resources. However, once eligibility has been approved, the long term care spouse may still have no more than \$2,000 of resources in his/her own name. Upon approval, the recipient shall be notified that all resources in excess of the \$2,000 resource limit must be transferred into the name of the community spouse using the *Spousal Impoverishment Information* form from the Standard Text for Copy/Paste.

This is essentially the same as increasing the CSRA from the original amount determined by the agency (which was challenged due to undue hardship) to an amount equal to all the countable resources owned by the couple, minus \$2,000.

Note: Granting of an undue hardship under this provision should be exceedingly rare. This is because the couple may instead administratively request an increase in the CSRA through the regular fair hearing process due to a claim of *significant financial duress* of the community spouse. The fair hearings process should in most instances supersede the undue hardship process outlined in this memo. See Medical KEESM 1619.

IV. QUESTIONS

For questions or concerns related to this document, please contact one of the KDHE Medical Policy Staff listed below.

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Questions regarding any KEES issues are directed to the KEES Help Desk at KEES.HelpDesk@ks.gov